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ATTORNEY FOR APPELLANT:

KURT A. YOUNG
Nashville, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

GARY DAMON SECREST
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CHRISTOPHER B. NEAL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 07A01-0603-CR-109[1]
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BROWN CIRCUIT COURT

[1] As we have pointed out in Lake County Board of Elections and Registration v. Copeland, --- N.E.2d ---, No. 45A04-0710-CV-560, slip op. p. 5 (Feb. 27, 2008), and Gilbert v. State, 874 N.E.2d 1015, n.1 (Ind. Ct. App. 2007), we have recently become aware of some difficulties in receiving the prompt transmission of fully-briefed appeals to our court. Indeed, the case herein was fully briefed on November 1, 2006, but was not transferred to our court until March 2008—a delay of nearly sixteen months. We remind counsel that a link to the Clerk's online docket is available at http://www.in.gov/judiciary/cofc/ and counsel may check the docket to confirm that the case has, in fact, been transmitted to this court after being fully briefed.

The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0212-FB-0673

April 4, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Christopher B. Neal appeals the ten-year sentence that was imposed following his conviction for Confinement,[2] a class B felony. Neal claims that the trial court erred in ordering the sentence to run consecutively to a sentence that was imposed for murder in another case because "the court failed to find a significant mitigating circumstance [that was] clearly supported by the record." Appellant's Br. p. 1. More specifically, Neal argues that the sentence should have been ordered to run concurrently with the murder sentence because the trial court improperly overlooked his cooperation with law enforcement officials as a mitigating factor. Additionally, Neal contends that ordering the sentence for confinement to run consecutively to the murder sentence was inappropriate when considering the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On December 2, 2002, Neal asked Jennifer Clephane for a ride to his grandmother's house in Brown County. At some point, Neal pointed a handgun at Clephane and demanded that she give him her vehicle. However, Neal then ordered

[2] Ind. Code § 35-42-3-3.

Clephane to drive him to Bloomington. Clephane agreed to do so because she believed that Neal would shoot her if she refused.

As a result of this incident, Neal was charged with class B felony confinement on December 27, 2002. On December 15, 2005, Neal's jury trial commenced. [3] After the parties gave their opening statements, Neal pleaded guilty.

Thereafter, the trial court conducted a sentencing hearing on January 10, 2006, and made the following observations:

> [T]he juvenile history will be a factor considered by the court. It is otherwise permissible I believe for me to consider that as an aggravator because it does reflect enough specifics to show that it was criminal conduct. . . . [T]he battery and the burglary, auto theft, are specific enough to reflect actual criminal activity by the juvenile and a pattern of criminal activity. In terms of the nature of the offense, it is a very serious offense. That's why it is a class B felony. I'm not sure there is anything in this particular . . . case that reflects either a substantially aggravating or mitigating aspect to the nature of the crime. It is a very serious crime. . . . The fact that there was a weapon, of course, cannot be considered an aggravator because it is an element of the offense. I think what it boils down to for me in terms of aggravators and mitigators are . . . for mitigators, the mental issues that Mr. Neal struggles with and I do believe that there is some genuine remorse and I also believe that in the end there was acceptance of responsibility. Those are mitigators. On the aggravator side, the juvenile history is an aggravator. And it does reflect a pattern of crime and they are crimes, juvenile adjudications for acts that would be serious crimes if committed by an adult. Balancing the aggravators and mitigators, I find that the advisory sentence of ten years is appropriate but I do find that it should be consecutive to the murder. I think that the mitigator of the history of the violence requires . . . the criminal history reflecting a pattern of . . . criminal activity and violence requires the consecutive.

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[3] A prior jury trial that commenced on October 18, 2005, ended in a mistrial after one of the jurors was dismissed. Tr. p. 382-83.

Tr. p. 920-22. The trial court then sentenced Neal to ten years of incarceration. As noted above, his sentence was ordered to run consecutively to a sixty-five-year sentence that had been imposed for murder in another case. Neal now appeals.

DISCUSSION AND DECISION

I. Mitigating Factor

Neal argues that the trial court abused its discretion in ordering the sentence for confinement to run consecutively to the sentence that was imposed for murder because his cooperation with law enforcement should have been identified as a significant mitigating factor. Therefore, Neal contends that we should revise his sentence and order it to run concurrently with the sentence that was imposed for murder.

Before addressing the merits of Neal's arguments, we observe that on April 25, 2005, the General Assembly amended Indiana's felony sentencing statutes, which now provide that the person convicted is to be sentenced to a term within a range of years, with an "advisory sentence" somewhere between the minimum and maximum terms. See Ind. Code §§ 35-50-2-3 to -7.

Here, Neal committed the charged offense before the amended statutes took effect. In Gutermuth v. State, 868 N.E.2d 427, 431 n.4 (Ind. 2007), our Supreme Court observed that "the sentencing statute in effect at the time a crime is committed governs the sentence for that crime." Because Neal committed the offense prior to the effective date of the sentencing amendments, we apply the former version of the statute.[4]

[4] When Neal committed the offense, the relevant sentencing statute provided that

This court has observed that sentencing decisions are within the sound discretion of the trial court. Jones v. State, 790 N.E.2d 536, 539 (Ind. Ct. App. 2003). It is within the trial court's discretion to determine both the existence and weight of a significant mitigating circumstance. Creager v. State, 737 N.E.2d 771, 782 (Ind. Ct. App. 2000). An allegation that the trial court failed to identify a mitigating factor requires the defendant to establish that the mitigating evidence is both significant and clearly supported by the record. Carter v. State, 711 N.E.2d 835, 838 (Ind. 1999). In other words, a trial court is not obligated to find a circumstance to be mitigating merely because it is advanced as such by the defendant. Spears v. State, 735 N.E.2d 1161, 1167 (Ind. 2000). However, when a trial court fails to find a mitigator that is clearly supported by the record, a reasonable belief arises that the trial court improperly overlooked this factor. Banks v. State, 841 N.E.2d 654, 658 (Ind. Ct. App. 2006), trans. denied.

When consecutive sentences are imposed, the trial court must enter, in the record, a statement that identifies all of the significant mitigating and aggravating factors, state why the factors are mitigating or aggravating, and show that those factors were balanced against each other. Creekmore v. State, 853 N.E.2d 523, 529 (Ind. Ct. App. 2006).

In this case, we note that Neal did not advance any argument at the sentencing hearing as to how his purported assistance with law enforcement personnel in the murder

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> A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances.

investigation amounted to a mitigating factor in this particular case. Therefore, the issue is waived. Georgopulos v. State, 735 N.E.2d 1138, 1145 (Ind. 2000). Also, in Dumas v. State, 803 N.E.2d 1113, 1124 (Ind. 2004), our Supreme Court determined that a trial court did not abuse its discretion when did not identify a defendant's cooperation with law enforcement officials as a mitigating circumstance when that alleged factor had not been presented to the trial court. For these reasons, Neal's claim fails.

II. Appropriateness

Neal further contends that his sentence is inappropriate when considering the nature of the offense and his character. Therefore, Neal claims that the trial court should have ordered the ten-year sentence that was imposed for confinement to run concurrently with the sentence that was imposed for murder.

Pursuant to Indiana Appellate Rule 7(B), our court has the constitutional authority to revise a sentence if, after due consideration of the trial court's decision, we find that the sentence is "inappropriate in light of the nature of the offense and the character of the offender." We defer to the trial court during appropriateness review, and we refrain from merely substituting our judgment for that of the trial court. Stewart v. State, 866 N.E.2d 858, 866 (Ind. Ct. App. 2007). The burden is on the defendant to persuade us that the sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

As for the nature of the offense, the evidence shows that Neal held Clephane against her will—at gunpoint—for a significant period of time. Tr. p. 888-89. Cephane was afraid that Neal was going to shoot her, and she continues to have recurring nightmares about the incident. Id. at 903. Although Clephane has undergone counseling,

she has not recovered from the lingering psychological effects of the crime. Id. In short, we do not find the nature of the offense to render Neal's sentence inappropriate.

Turning to Neal's character, we note that his contacts with the criminal justice system began as a juvenile and have continued as an adult. As the trial court observed, Neal was adjudicated a delinquent for the crimes of battery, burglary, and auto theft had those offenses been committed by an adult. Tr. p. 921. Moreover, the evidence demonstrated that Neal committed a murder only days after he committed the instant offense. PSI p. 5-6. It is apparent that the frequency and severity of Neal's criminal activity has escalated despite his numerous contacts with the criminal justice system, thus demonstrating his violent character and disregard for the law.

In sum, we do not find Neal's sentence to be inappropriate in light of the nature of the offense and his character. As a result, we conclude that the trial court did not err in ordering the ten-year sentence for confinement to run consecutively to that which was imposed for murder.

The judgment of the trial court is affirmed.

RILEY, J., and ROBB, J., concur.